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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEVIN NEILSON, GRINDROD INTERNATIONAL LIMITED and ATLAS TRADING AND SHIPPING LIMITED,

Petitioners,

v.

SEABOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns an employee's right to demand arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, implemented at 9 U.S.C. § 201 *et seq.* (the "Convention"). It particularly concerns the proper scope and application of Article II(2) of the Convention, relating to when an arbitration clause must be "signed by the parties or contained in an exchange of letters or telegrams," and directly implicates a split of authority between the Court of Appeals for the Fifth Circuit in *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666 (5th Cir. 1994), and the Second Circuit in *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999). The Missouri Court of Appeals sided with the Second Circuit.

The petition also concerns the separate question of who decides arbitrability when an arbitration provision "clearly and unmistakably" refers questions of arbitrability to the arbitrators within the meaning of this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), but, on its own "threshold" analysis, the court considers the claims do not "invoke" the agreement.

The Petition presents the following questions:

1. Does Article II(2) of the Convention require arbitration of the employer's claims when the employment agreement prepared and signed by the employer contains an arbitration clause, was tendered

to an employee but not signed by him, and thereafter was performed without objection by either party and arbitration is sought by the employee?

2. Alternatively to 1, is an arbitration clause enforceable pursuant to Section 2 of the FAA when it is in writing within the meaning of the FAA but is not "signed by the parties or contained in an exchange of letters or telegrams" within the meaning of Article II(2) of the Convention?

3. When a defendant seeks to compel arbitration pursuant to an arbitration agreement which clearly and unmistakably refers questions of arbitrability to the arbitrators, may a Court refuse to compel arbitration in respect of arbitrability on the basis of its own threshold determination that the claims alleged in the complaint "do not invoke the agreement"?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following were parties to the proceedings before the Missouri Supreme Court:

Kevin Neilson
Atlas Trading & Shipping Limited
Grindrod International Limited

Additionally, the following parties are defendants in the underlying action pending before the Circuit Court of Jackson County, Missouri but were not parties to the motions which are the subject of this petition:

Grindrod Limited
Unicorn Shipping (Proprietary) Limited

Grindrod Limited's shares are publicly traded on the JSE Securities Exchange in South Africa. Atlas Trading & Shipping Limited, Grindrod International Limited and Unicorn Shipping (Proprietary) Limited are directly or indirectly wholly owned subsidiaries of Grindrod Limited.

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Kevin Neilson, Grindrod International Limited and Atlas Trading and Shipping Limited hereby respectfully petition for a writ of certiorari to review the order of the Missouri Court of Appeals, Western District, issued in the action before it bearing docket number WD67628, in respect of which the Missouri Supreme Court declined to grant discretionary review in an order issued in the action before it bearing docket number SC89170.

OPINIONS BELOW

The decision of the Missouri Court of Appeals, Western District, (1-a),[1] was filed on January 15, 2008. 248 S.W.3d 27 (Mo. App. W.D. 2008). By order dated March 4, 2008, the Missouri Court of Appeals, Western District overruled petitioners' motion for rehearing and denied their motion to transfer to the Supreme Court of Missouri. By order entered on April 15, 2008, the Supreme Court of Missouri entered its order denying petitioners' application to transfer the cause to that Court. (29-a). Those orders are not officially reported. The Judgment and Order of the Circuit Court of Jackson County, Missouri, issued on December 21, 2006 (12-a), is not officially reported.

JURISDICTION

The order of the Supreme Court of Missouri was entered on April 15, 2008. A petition for writ of certiorari is due on or before July 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. References to the Appendix hereto are cited as "__-a".

TREATIES AND STATUTES INVOLVED

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. § 201 *et seq.* (the "Convention").

9 U.S.C. § 2 provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Article II of the Convention, implemented pursuant to 9 U.S.C. § 201, provides as follows:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article VII(i) of the Convention, provides as follows:

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country when such award is sought to be relied upon.

STATEMENT OF THE CASE

A. Statutory Framework

This Court has very recently reaffirmed that the FAA represents a "national policy favoring arbitration" which "applies in state as well as federal courts and forecloses state legislative attempts to undercut the enforceability of arbitration agreements." *Preston v. Ferrer*, 128 S. Ct. 978, 2008 U.S. LEXIS 2011, * 13 (Feb. 20, 2008)(internal quotation marks omitted). The decision for which Petitioners seek review presents a challenge to that national policy by denying an employee's motion to compel arbitration of his employer's claims.

The FAA provides in part that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. "Commerce" is defined to include "commerce among the several States or with foreign nations. . . ." *Id.* § 1.

The Convention, also applicable, provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. "Arbitration agreements subject to the Convention are enforced in accordance with Chapter 2 of the FAA." *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135,

146 (2d Cir. 2001)(citations and internal quotation marks omitted)(citing 9 U.S.C. § 201). An arbitration agreement exists within the meaning of the Convention if "(1) there is a written agreement; (2) the writing provides for arbitration in the territory of a signatory of the convention; (3) the subject matter is commercial; and (4) the subject matter is not entirely domestic in scope." *Id.*, 241 F.3d at 146 (citations omitted).

In determining whether an agreement to arbitrate is enforceable under the FAA and the New York Convention, general state contract law principles apply. *I.K. Bery, Inc. v. Irving R. Boody & Co., Inc.*, 2000 U.S. Dist. LEXIS 1872, * 7 (S.D.N.Y. 2000)(citing *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987)). "The FAA does, however, preempt state law rules that invalidate arbitration provisions on grounds not applicable to other contracts." *Id.* (citing *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687 (1996)). It has long been the rule that "[a]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

B. The Present Dispute

Respondent Seaboard Corporation is a holding company of subsidiaries and affiliates which engage in various commodities businesses worldwide. Starting in February 1999, Petitioner Neilson's employer was Seaboard Overseas Limited ("SOL"), a Bermuda-based subsidiary. Neilson was located in Bermuda and had an employment contract with SOL dated February 15, 1999.

In late 2000, Neilson relocated from Bermuda to North Carolina. He remained employed with SOL at that time, however, and on January 1, 2001, SOL issued Neilson a revised employment contract signed on behalf of SOL. Although Neilson did not sign the agreement, he received it and worked for SOL pursuant to its terms.

Paragraph 16 of the Employment Contract contains a "Governing Law and Jurisdiction" clause which provides in relevant part as follows:

> 16- Governing Law and Jurisdiction
>
> Any dispute between any of the parties hereto or claim by a party against another party arising out of or in relation to this agreement or in relation to any alleged breach thereof shall be finally determined by arbitration in accordance with the rules then in force of the American Arbitration Association by a panel of three arbitrators. The arbitration proceedings shall take place in New York, New York or such other location as the parties in dispute hereafter may agree upon; and such proceedings will be conducted in the English language and shall be governed by the laws of Bermuda. . . . [LF. 1127-28.[2]]

Rule 6(a) of the applicable AAA Employment Arbitration rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction,

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2. References to the Legal File before the Missouri Court of Appeals Western District are cited as "(LF. ___)."

including any objections with respect to the existence, scope or validity of the arbitration agreement." (LF. 1087)(Emphasis added.).[3] Rule 6(b) provides that "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." (LF. 1087).

Neilson relocated again in July 2002 from North Carolina to Kansas. Neilson's principal responsibility continued to involve running the commodities trading operations in Bermuda. From the time he received the 2001 contract with SOL until his resignation in 2005, Neilson was never provided with a new contract by any Seaboard entity, nor did he ever discuss any change in his employment status at any time.

Neilson resigned from SOL on April 26, 2005. He thereafter entered an agreement to be a consultant to Island View Shipping, Inc., a subsidiary of defendant Grindrod Limited. Subsequently, certain other members of the commodity trading group resigned from the Seaboard Group and accepted positions with the Grindrod Group. Following meetings in Kansas City, Missouri on May 9-10, 2005, a term sheet was negotiated setting forth "terms pursuant to which Grindrod Limited (or its nominee) would purchase certain assets of Seaboard Overseas Limited and employ certain employees of SOL." (LF. 987-89).

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3. A copy of the AAA Employment Arbitration Rules is also available at www.adr.org/sp.asp?id=32904.

Ultimately, an Asset Purchase Agreement dated May 24, 2005 was entered between SOL on the one hand and Grindrod subsidiaries Atlas Trading & Shipping Limited ("Atlas") and Grindrod International Limited ("GIL") on the other (the "Purchase Agreement"). (LF. 1015-1041). Section 9.07(a) of the Purchase Agreement provides as follows:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. *The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.* [LF. 1036. Emphasis added.]

"Dispute," as the term is used in the preceding paragraph, is a defined term in the Purchase Agreement which means:

> Any dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement. [LF. 1019.]

Section 9.07(b) of the Purchase Agreement incorporates the International Arbitration Rules of the American Arbitration Association, (LF. 1036). Article 15 of the applicable AAA arbitration rules provides that

"[t]he tribunal shall have the power to rule on its own jurisdiction, *including any objections with respect to the existence, scope or validity of the arbitration agreement.*" (LF. 1108)(Emphasis added.).[4]

C. Procedural Posture

1. Seaboard's Missouri Lawsuit

Respondents commenced a lawsuit against defendant Neilson and various Grindrod entities (including Petitioners herein) in the Circuit Court of Jackson County, Missouri on or about August 26, 2005. (LF. 1043-68). Respondents allege that, while employed by Seaboard, Neilson was tasked in early 2005 with negotiating with the Grindrod Group over a possible sale of Seaboard's commodity trading business. (LF. 1052-53, ¶¶36-40). In the course of these negotiations, Respondents allege, Neilson accepted an offer of employment from Grindrod and thereupon resigned from Seaboard in April 2005. (LF. 1053-54, ¶¶41-52).

According to the complaint, Neilson "conspired" with Grindrod to persuade other members of Seaboard's commodities trading group to resign and join Grindrod and to "force" Seaboard to sell its commodities trading business to Grindrod at well below market value pursuant to the Purchase Agreement. (LF. 1056-57, ¶¶63-64). Respondents allege that the only reason Grindrod and Neilson were able to implement this

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4. A copy of the AAA International Dispute Resolution Procedures can be found on the AAA website at www.adr.org/sp.asp?id=33994.

"conspiracy" is because Neilson breached fiduciary duties to Seaboard and improperly used confidential and proprietary information belonging to plaintiffs and improperly disseminated it to Grindrod. (LF. 1058, ¶71). Respondents further allege that the Grindrod entities, including Petitioners Atlas and GIL, conspired with Neilson, (LF. 1065-65, ¶123-131), tortiously interfered with Neilson's contractual and fiduciary obligations to Respondents, (LF. 1065-67, ¶132-146), and tortiously interfered with their "prospective business expectancy or prospective business relationship" with their customers. (LF. 1067, ¶147-155). Respondents' allegations of wrong-doing are denied by Neilson, Atlas and GIL.

2. The Missouri Proceedings

Defendants removed the action to the Federal District Court for the Western District of Missouri pursuant to 9 U.S.C. § 205, which allows for removal of cases in which the claims relate to an arbitration agreement which is governed by the Convention. (LF. 27-33). Petitioners moved to remand the matter to the state court, alleging that the Federal District Court lacked subject matter jurisdiction. (LF. 124). By order dated August 1, 2006, the District Court granted Respondents' motions to remand, concluding that it lacked subject matter jurisdiction. (LF. 717).[5]

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5. Under Eighth Circuit case law, a District Court order remanding a case to state court on the basis that it lacks subject matter jurisdiction is not appealable, "whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Transit Casualty Co. v. Certain Underwriters at Lloyds*,

(Cont'd)

On August 17, 2006, Petitioners thus commenced an action in the Supreme Court of New York seeking to compel arbitration, Case No. 602907/06 (the "New York Action"). (LF. 973). On August 18, 2006, Petitioners filed a motion before the Circuit Court of Jackson County, Missouri seeking a stay of the Missouri proceedings pending resolution of the New York Action. (LF. 915). Respondents thereafter filed a motion in the Missouri action seeking to enjoin Petitioners from proceeding with the New York Action.

By order dated October 23, 2006, the trial court in Missouri denied Petitioners' motion to stay the proceedings pending the outcome of the New York Action. (14-a). In so doing, the Court undertook to examine the merits of Petitioners' application to compel arbitration, noting that

> [t]he decision turns on whether or not the alleged facts of Plaintiffs' Petition fall under the arbitration clause contained in the January 1, 2001 foreign service offer letter sent from SOL to Kevin Neilson and the Asset

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(Cont'd)

119 F.3d 619, 624-25 (8th Cir. 1997)(holding that action removed to district court pursuant to 9 U.S.C. § 205 and thereafter remanded for lack of subject matter jurisdiction is "unreviewable" pursuant to 28 U.S.C. § 1447(d)). On the other hand, because the district court remanded for a lack of subject matter jurisdiction, "it lacked jurisdiction to make any substantive rulings, and, thus, 'no rulings of the federal court have any preclusive effect on the substantive matters before the state court.'" *Id.* at 624 (quoting *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1182 (9th Cir. 1989)).

> Purchase Agreement dated May 24, 2005 between Seaboard Overseas Limited and Atlas and Grindrod.

(20-a). The Court ultimately concluded that the claims fall under neither arbitration clause and thus are not subject to arbitration. (21-a; 23-a). Accordingly, the Court denied Petitioners' requested stay.

By order dated October 27, 2006, the lower court granted Respondent's motion to enjoin Petitioners from proceeding with the New York Action, (LF. 1213-22), reiterating its finding that "the defendants' claims of a right to compel arbitration do not apply to the claims raised by plaintiffs in their Petition." (LF. 1219).

On November 1, 2006, Petitioners filed their Notice of Appeal from the lower court's orders denying Petitioners' requested stay, granting Respondents requested injunction, and holding that Respondents' claims are not subject to arbitration. (LF. 1284-85). On December 21, 2006, to address an appellate jurisdictional inquiry by the clerk for the Missouri Court of Appeals, Western District, the lower court issued a Judgment and Order holding as follows:

> For the reasons stated in the court's order dated October 23, 2006, a copy of which is appended hereto, it is adjudged and decreed that the defendants Kevin Neilson, Grindrod International Limited and Atlas Shipping and Trading Limited have failed to provide [sic] the existence of any valid or pertinent arbitration agreement that would subject or

> require the arbitration of any of plaintiffs' claims raised in this lawsuit. Accordingly Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration is DENIED. The parties will litigate plaintiffs' claims in this lawsuit. [12-a.]

In an opinion dated January 15, 2008, the Missouri Court of Appeals, Western District affirmed. (1-a). As to Neilson, the Court found that the arbitration provision in the employment agreement was unenforceable under the Convention because Neilson had not signed it and because it had not been contained in an "exchange of letters or telegrams" within the meaning of Article II(2) of the Convention. (8-a). The Court did not address Neilson's alternative argument that the arbitration provision was nevertheless enforceable under Chapter 1 of the FAA, 9 U.S.C. ¶ 2, which merely requires the agreement to be in writing; however, implicit in its ruling was the conclusion that the agreement was not enforceable under the FAA. The Court also did not address Neilson's contention that questions of arbitrability should have been referred to the arbitrators given the agreement's incorporation of arbitration rules which clearly and unmistakably so provide.

As to Atlas and GIL, the Appeals Court rejected (in a footnote) Petitioners' contention that arbitrability must itself be submitted to arbitration and concluded that "none of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement." (9-a, n.5).

REASONS FOR GRANTING THE PETITION

The Missouri Court's refusal to recognize and enforce the parties' arbitration agreements is directly contrary to the strong Federal policy in favor of arbitration which is embodied in both the FAA and the Convention—as well as in the prior decisions of this Court—and creates an untenable conflict by which an arbitration agreement may be fully enforceable under the FAA but is deemed unenforceable by virtue of the United States' accession to the Convention, a treaty whose express purpose was to foster and encourage the recognition and enforcement of international arbitration agreements.

Moreover, the decision directly implicates a split of authority between the United States Court of Appeals for the Fifth Circuit on the one hand, and the Second Circuit and other courts on the other, on the proper interpretation and applicability of the Convention's "signature" requirement. Under the Fifth Circuit's view, the question of whether the contract containing the arbitration provision was "signed by the parties or contained in an exchange of letters or telegrams" should never even have been reached in this case.

The decision is also directly contrary to the prior decisions of this Court which have made clear that an agreement which "clearly and unmistakably" refers questions of arbitrability to the arbitrators must be enforced.

A. The Missouri Court's Decision Is In Direct Conflict With The Terms Of The Convention And Clear Federal Policy Favoring Enforcement Of Agreements to Arbitrate

The Missouri Court ruled the arbitration provision in Neilson's Employment Contract was unenforceable under the Convention because it was neither "signed by the parties" nor "contained in an exchange of letters or telegrams." Although Neilson alternatively contended that the arbitration clause was nevertheless enforceable under Section 2 of the FAA, the Missouri Court did not address this argument. By so holding, and by declining to consider the enforceability of the agreement under 9 U.S.C. § 2, the Missouri Court effectively ruled that the Convention fully preempts the FAA insofar as enforcement of international agreements to arbitrate is concerned. This ruling is in direct conflict with the express terms of the Convention itself and is contrary to clear federal policy favoring the enforcement of agreements to arbitrate.

Nothing in the Convention or in Chapter 2 of the FAA, by which it was implemented, suggests that it was the intention of the United States, in acceding to the Convention, to restrict in any way the existing rights of parties to enforce arbitration agreements. Rather, the Convention was intended to supplement the FAA and provide *additional* means of enforcing arbitration agreements. Indeed, this is explicitly stated in Article VII of the Convention, which preserves to "any interested party . . . any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country

where such award is sought to be relied upon." This is a clear statement that nothing in the Convention should be construed to "preempt" more favorable existing arbitration law in the US or to preclude "interested parties" from relying on domestic arbitration law to the extent the Convention does not provide the desired relief.

The United Nations Commission on International Trade Law ("UNCITRAL"), which has historically played a major role in drafting and interpreting United Nations' treaties,[6] has published its own recommendation, adopted on July 7, 2006, (25-a),[7] concerning the interpretation of Article II(2) of the Convention, in which it has specifically recommended that Article II(2) "be applied recognizing that the circumstances described therein are not exhaustive." (28-a).

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6. UNCITRAL was established by the United Nations General Assembly in 1966 (*see* Resolution 2205(XXI) of 17 December 1966) and was given a mandate to "further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law." *See* www.uncitral.org/uncitral/en/about/origin.html.

7. The UNCITRAL recommendation can also be found on the UNCITRAL web site at the following address: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/AZE.pdf.

UNCITRAL further recommends as follows:

> that article VII, paragraph 1 of the Convention . . . should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement. [28-a.]

Given the plain language of Article VII of the Convention and this clear statement of intent by UNCITRAL, any ruling that an arbitration agreement which falls outside the Convention cannot be enforced in the individual signatory states pursuant to domestic law is plainly wrong. The Missouri Court made no such explicit holding in affirming the decision below, but this was undeniably the effect of its ruling. The Missouri Court cited (at 4-a., n.3) to 9 U.S.C. § 208, which provides that "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." Section 208, however, was not intended to alter the application of Chapter 1 of the FAA except insofar as it was applied to the Convention.

Where a contract does not fall within the Convention's writing requirement but does fall within the coverage of the FAA, the Convention does not preclude the Court from granting appropriate relief solely under the provisions of Chapter 1. To the contrary, the Court should be bound to follow Chapter 1 and to enforce the arbitration agreement pursuant to its terms.

Had the Missouri Court applied Chapter 1 of the FAA in the present case, it would have had no choice but to find the arbitration agreement enforceable. It is established Federal policy under the FAA that an arbitration provision is enforceable on precisely the same terms as every other provision of a written contract. 9 U.S.C. § 2. In particular, it is well established that the FAA contains no requirement that a contract be signed in order for its arbitration clause to be enforceable. *See, e.g., Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975).

There is no doubt that the Employment Contract as a whole was an enforceable agreement between SOL and Neilson by virtue of the facts that (1) SOL prepared, signed and provided the document to Neilson; (2) Neilson accepted it; and (3) both parties subsequently tendered performance under it. *See Marlar v. Yellow Transp.*, 2004 U.S. Dist. LEXIS 26653 (W.D. Mo. 2004)(finding binding arbitration agreement existed under the FAA where employer sent employees e-mail notice of arbitration policy which was to be binding on employees who continued their employment beyond a specified date). Accordingly, because the Employment Contract as a whole is a valid, enforceable contract, and because arbitration clauses may be treated no differently than any other contract term in an agreement, 9 U.S.C. § 2, the arbitration agreement is valid irrespective of the fact that Neilson did not sign the agreement, and it should have been enforced by the Missouri Court.

B. The Missouri Court's Decision Directly Implicates An Existing Conflict Between the Fifth Circuit And Other Circuit Courts As To Whether Article II(2)'s "Signed" Requirement Applies To Arbitration Clauses In Written Contracts

As noted above, Article II(2) of the Convention provides that "The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The Missouri Court found that Neilson's Employment Contract was governed by the Convention and found that there was not an "agreement in writing" to arbitrate within the meaning of Article II(2).

Although the Missouri Court did not acknowledge it, however, there is presently a split of authority among the United States Courts of Appeal concerning the proper interpretation of Article II(2), and if the Missouri Court had followed the ruling of the Court of Appeals for the Fifth Circuit in *Sphere Drake Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), the question of whether Neilson's Employment Contract was "signed by the parties or contained in an exchange of letters or telegrams" should never even have arisen.

According to the Fifth Circuit, Article II(2) requires one to differentiate between "an arbitral clause in a contract" and a separate stand-alone "arbitration agreement." Only the latter must be either (a) signed by the parties or (b) contained in an exchange of letters or telegrams. *Id.* at 669. Put more concretely, under *Sphere Drake*, because the arbitration clause here at

issue was contained in an otherwise enforceable contract between Neilson and SOL—and was not a separate arbitration agreement—it was not necessary that the agreement be "signed by the parties or contained in an exchange of letters or telegrams."

Other courts, most notably including the Court of Appeals for the Second Circuit in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210 (2d Cir. 1999), have taken a different view of Article II(2) and have concluded that both arbitration clauses in contracts *and* separate arbitration agreements must be signed or contained in an exchange of letters or telegrams. *See also Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003).

Although the Fifth Circuit's decision has been criticized, Petitioners submit that its interpretation is more consistent with the broad Federal policy favoring arbitration and is also more consistent with UNCITRAL's stated recommendation that Article II(2) "be applied recognizing that the circumstances described therein are not exhaustive." (29-a). Moreover, it is more consistent with existing domestic law, embodied in the FAA, that an arbitration provision in a contract must be enforced on the same basis as any other contractual term, and while it must be in writing it need not be signed by the parties or meet any other "special" criteria to be enforceable.

This clear split of authority between the Circuits on this important question of the proper interpretation of Article II(2) of the Convention should be resolved by this Court and justifies granting Petitioners' petition.

C. The Missouri Court's Decision Narrowly Construing the "Signed" Requirement Of The Convention Conflicts With Clear Federal Policy Favoring Enforcements Of Agreements To Arbitrate

The Missouri Court's narrow interpretation of Article II(2) of the Convention in finding that there was not an "exchange of letters or telegrams" in the present case within the meaning and intent of Article II(2) is likewise inconsistent with the clear purpose of the Convention to promote the enforcement of agreements to arbitrate disputes. As noted above, the Missouri Court's holding creates an anomalous situation in which Neilson's arbitration agreement would be fully enforceable under the FAA but, because of the U.S.'s accession to the Convention, the arbitration provision is thereby unenforceable. This is entirely backwards. The clear intent of the Convention is that arbitration is to be encouraged, *see, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)(stating that the goal of Convention is to encourage the recognition and enforcement of commercial arbitration agreements); *Rhone Mediterranee Comp. v. Lauro*, 712 F.2d 50, 54 (3d Cir. 1983)("the policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate."), and as the UNCITRAL recommendation makes clear, the Convention's writing requirement should be given the broadest, most inclusive interpretation possible towards this end.

In the present case, where the employment agreement was written and signed by SOL, provided to and received by Neilson, and where Neilson subsequently tendered and SOL accepted performance

thereunder without objection, it is fundamentally contrary to Federal policy and the intent of the Convention to hold that the arbitration provision within that otherwise enforceable contract is unenforceable because Neilson did not sign the document or otherwise return it to SOL. By signing the agreement, SOL clearly intended to be bound by it, and by performing under it without objection, Neilson clearly did as well. Accordingly, the arbitration clause in Neilson's Employment Contract should be enforced.

D. The Missouri Court's Decision Is In Direct Conflict With This Court's Precedents Concerning Who Decides Arbitrability

It is established authority of this Court that a "clear and unmistakable" agreement to arbitrate arbitrability must be enforced. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). There can be no dispute that the arbitration clause in the Purchase Agreement with Atlas and GIL, which provided that "[t]he Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, *including Disputes over arbitrability or jurisdiction*," (emphasis added), constitutes a "clear and unmistakable" agreement to arbitrate arbitrability. Moreover, both Neilson's Employment Contract and the Purchase Agreement incorporated arbitration rules of the American Arbitration Association which specifically refer to the arbitrators "[a]ny objections with respect to the existence, scope or validity of the arbitration agreement." The Circuit Courts of Appeal which have considered such provisions uniformly have found that they clearly and unmistakably provide that questions

of arbitrability are to be decided by the arbitrators. *See e.g., Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminex Int'l Co. LP v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005). Notwithstanding these clear provisions, the Missouri Court totally ignored the issue of who should decide arbitrability under Neilson's Employment Contract and denied arbitration for Atlas and GIL under the Purchase Agreement on the threshold question of arbitrability as follows: "because we hold that the claims alleged by the Plaintiffs do not invoke the Agreement, the Agreement cannot control. Therefore this point is denied." (9-a, n. 5).

In so holding, the Missouri Court eschewed the controlling authority of *First Options* and ignored the clear intent of the parties by substituting its own judgment for that of the arbitrators on the question of whether the subject disputes fall within the scope of the arbitration agreement here at issue. There can be no mistaking the intent of the parties to have as broad an arbitration agreement as possible; indeed, this intent is made explicit in the agreements.

There is nothing in *First Options*, nor in other relevant case law, to suggest that the Court may impose its own "threshold" analysis of whether a clear and unmistakable agreement to arbitrate arbitrability should be enforced. It is an agreement to arbitrate just like any other, and the parties should have a full and fair opportunity to present their respective positions to the arbitrators as agreed. If, as Respondents contend, arbitration should not ultimately be compelled in respect of these claims, then that is for the arbitrators to decide,

and they are, of course, free to dismiss the arbitration if they consider that is the appropriate resolution of the dispute.

But one thing is clear: by agreement, the parties specifically agreed to divest the Court of the power to make the determination of what claims are or are not subject to arbitration, and that agreement *must* be honored. Indeed, the Court is no more authorized to refuse arbitration on this question of arbitrability than it would be permitted to grant judgment on a claim on the merits, rather than refer it to arbitration, on the ground that the party seeking arbitration stood no chance of actually prevailing on the claim in any event. That kind of prejudgment is simply not allowed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT FILED JANUARY 15, 2008

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD - 67628

Opinion Filed: January 15, 2008

Seaboard Corporation, et al.,

Respondents

v.

Grindrod Limited, et al.,

Appellants

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
THE HONORABLE SANDRA C. MIDKIFF, JUDGE

Before: Howard, C.J., and Spinden and Holliger, JJ.

INTRODUCTION

The Defendants in a civil action in Jackson County, Missouri, filed a Motion to Stay the litigation so that arbitration could be compelled in New York. The trial court denied the Motion to Stay and we affirm.

Appendix A

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs in this action, Seaboard, one of its subsidiaries and one of its divisions (collectively referred to as the Plaintiffs) filed a Petition against the Defendants in Jackson County. The Defendants are Grindrod and three of its entities (collectively referred to as the "Corporate Defendants") and Kevin Neilson, a former employee of Seaboard.

In their Petition, the Plaintiffs allege that, while still employed by them, Neilson began to work with the Corporate Defendants in order to force the Plaintiffs to sell a portion of their business for below market price. They additionally allege that the Defendants lured other employees of the Plaintiffs to leave and begin working for the Defendants. Against Neilson, the Plaintiffs allege fraud, negligent misrepresentation, breach of fiduciary duty, misappropriation of corporate opportunity, breach of confidentiality agreements, civil conspiracy, and tortious interference with prospective business expectancy or prospective business relationships. Against the Corporate Defendants, the Plaintiffs allege civil conspiracy, tortious interference with contract, aiding and abetting breach of fiduciary duty, and tortious interference with prospective business expectancy or prospective business relationships.

After being served, the Defendants attempted to remove the action to the federal court based on the international Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

"Convention"),[1] implemented by the United States Code in Chapter 2 of Title 9. 9 U.S.C. § 201 (2000). The Defendants argued that all of the claims were covered by arbitration agreements. They argued that an employment letter that contained an arbitration clause covered the claims against Neilson and that the claims against the Corporate Defendants were covered by the Asset Purchase Agreement for the sale of the Plaintiffs operation. The federal court denied the removal based on a finding that neither arbitration clause was applicable.

The Defendants then filed a motion to stay the Jackson County litigation based on their filing a motion to compel arbitration in New York.[2] Following extensive briefing and a hearing, the trial court denied the motion to stay. Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, the denial of the motion to stay is immediately appealable. 9 U.S.C. §16 (2000); Missouri Supreme Court Rule 74.01(b) (2007). The trial court based its decision, like the federal court, on the finding that there was no "valid or pertinent arbitration agreement" between any of the parties.

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[1] The Convention applies in this case because some of the Plaintiffs and Defendants are foreign corporations. Neither party disputes that that the Convention is applicable in this case.

[2] The Defendants filed in New York based on the forum selection clause in the Purchase Asset Agreement arbitration clause.

Appendix A

STANDARD OF REVIEW

Our review of a denial of a motion to stay is *de novo*. *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 227-28 (Mo. App. W.D. 2002). We first "determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." *Dunn Indus. Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003). In determining whether an arbitration agreement exists in this case, we look to the FAA and the Convention. If there is any conflict between the FAA and the Convention, the Convention controls. 9 U.S.C. § 208 (2000).[3] *See also M&C Corp. v. Erwin Behr GnthH& Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996).

ANALYSIS

The Defendants allege five points of error in their brief. However, these five points essentially allege that the trial court erred in not finding that the arbitration clause in the alleged Employment Letter applied to the claims against Neilson and that the arbitration clause in the Asset Purchase Agreement applied to the claims against the Corporate Defendants.

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[3] 9 U.S.C. § 208 states: "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

Appendix A

THE EMPLOYMENT LETTER

Neilson argues that the arbitration clause in his Employment Letter requires that all of the claims alleged against him be submitted to arbitration. The Plaintiffs argue that since Neilson did not sign the Employment Letter, under the Convention, there is no enforceable arbitration clause.[4] We agree.

Neilson first began his employment with a subsidiary of the Plaintiffs in 1995. In 1999, Neilson began working for another subsidiary of the Plaintiffs, which was a Bahamian company. This subsidiary would issue employment letters for its foreign service employees. In December 2000, Neilson relocated from Bermuda to North Carolina for personal reasons. As a result of the move, to reflect his new domicile, Neilson was sent a new Employment Offer letter, dated January 1, 2001. This is the Employment Letter that Neilson bases his claim for arbitration on.

The letter contained a paragraph compelling arbitration for any "claim by a party against another party arising out of or in relation to this agreement." It also stated that Neilson was required to "sign and return" a copy of the letter to signify his acceptance of the terms and conditions of employment contained in

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[4] The Plaintiffs also argue that even if we were to find that the Employment Letter was a valid arbitration agreement, it was for a previous position that Neilson had with one of its subsidiaries and was no longer applicable at the time of the alleged misconduct. We do not reach the issue.

the letter. Neilson concedes that he never signed or returned the letter. The Plaintiffs argue that in July of 2002, he left his position in North Carolina and began working for one of the Plaintiffs' other divisions in Overland Park. The Petition alleges that it was while in this position that he committed the alleged misconduct and resigned from his position in April 2005.

Under Article II of the Convention, in order for an arbitration clause to be enforceable, it must be an "agreement in writing." The article defines "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." (Emphasis added.)

A representative of the Plaintiffs signed the Employment Letter. However, as Neilson concedes, he did not sign the letter, and, based on our review of the record, there was no "exchange of letters or telegrams." Therefore, under the Convention, there is no enforceable arbitration agreement.

Neilson attempts to compare this case to *Polytek Engineering Co. v. Jacobson Cos.*, 984 F.Supp. 1238 (D. Minn. 1997), and *Gabriel Capital, L.P. v. Caib Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66 (N.Y. App. Div. 2006). However, neither of these cases presents facts analogous to our case.

In *Polytek*, Polytek was attempting to purchase rubber-recycling equipment from Jacobson that it

needed for a contract with Hebei Import & Export. 984 F.Supp. at 1239. The Purchase Order between Polytek and Jacobson referenced and incorporated the contract between Polytek and Hebei, and the contract was attached to it. *Id.* The Hebei contract contained an arbitration clause. *Id.* A dispute arose and Polytek sought arbitration against Jacobson. *Id.* Jacobson denied being a party to the arbitration agreement. *Id.* at 1240.

The court in *Polytek* found that under the Convention, Jacobson was indeed a party to the contract. *Id.* at 1241. The court pointed to facsimiles that were sent and received between Polytek and Jacobson. In one such facsimile, a representative of Polytek asked that Jacobson issue a purchase order with the Hebei contract attached. *Id.* A representative of Jacobson responded that he would "issue a purchasing order with the contract as attachment to you within this week." *Id.* There was no argument that the purchase order governed the relationship between Polytek and Jacobson. *Id.* Additionally, there was correspondence between Jacobson and Polytek regarding the necessity of following a particular section of the Hebei contract. *Id.* A representative of Jacobson also confirmed the commencement of the contract. *Id.*

The decision of *Polytek* was based on the exchange of numerous facsimile and correspondence. Although the court does reference the "conduct" of the parties as illustrating the applicability of the contract, it does not hold that it was this behavior and not the "exchange of

letters or telegrams" that controlled their holding that there was an applicable "agreement in writing." As previously mentioned, there is no "exchange of letters or telegrams" of any type between Neilson and the Plaintiffs. Therefore, *Polytek* is of no help to Neilson.

In *Gabriel*, there was an exchange of facsimiles and correspondence between Gabriel and a subsidiary CAIB. 814 N.Y.S.2d at 68. Gabriel was attempting to argue that since the subsidiary and not CAIB signed the agreement, CAIB could not attempt to enforce it. *Id.* However, the court disagreed with this contention. The court held, "the agreement reached by [Gabriel] and CISEG, CAIB's subsidiary, via exchange of documents . . . incorporated by reference the arbitration clause of the purchase agreement signed by CISEG." *Id.* As in *Polytek*, the court does reference the actions of the parties leading to the presumption of an agreement, but the court does not reference this as a deciding factor and is merely dicta. *See Id.* at 68-69. Therefore, like *Polytek*, *Gabriel* is of no help to Neilson.

We affirm the trial court's denial for the motion to stay based on the finding that there was no applicable arbitration clause between Neilson and the Plaintiffs.

The Asset Purchase Agreement

We now turn to the Asset Purchase Agreement that was used by the Corporate Defendants to purchase from the Plaintiffs a portion of their business operation. The Corporate Defendants argue that the claims in the

Plaintiffs' Petition fall under the "broad" arbitration clause in the Agreement and, therefore, must be arbitrated.[5] The Plaintiffs argue that the claims alleged in the Petition do not fall within the scope of the Agreement. We agree.

The arbitration clause in the Agreement states that "[a]ny Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction." "Dispute" is defined as:

> [A]ny dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

"Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not

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[5] The Corporate Defendants also argue that based on the arbitration clause found in the Agreement, it is the duly of an arbitrator to determine the arbitrability of these claims. However, because we hold that the claims alleged by the Plaintiffs do not invoke the Agreement, the Agreement cannot control. Therefore, this point is denied.

agreed to arbitrate." *Dunn Indus. Group, Inc.*, 112 S.W.3d at 435. "Arbitration must be compelled where a tort claim arises directly out of a dispute regarding the terms of the parties' contract" *Nw. Chrysler Plymouth, Inc. v. DaimlerChrysler Corp.*, 168 S.W.3d 693, 696 (Mo. App. E.D. 2005). "The relationship between the tort claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties." *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995), "At the very least, for a tort claim to be subject to arbitration under a broad arbitration clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract." *Rhodes v. Amega Mobile Homes Sales, Inc.*, 186 S.W.3d 793,798 (Mo. App. W.D. 2006) (quoting *Estate of Athon v. Conseco Finance Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002)). "Where a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled." *Nw. Chrysler Plymouth, Inc.*, 168 S.W.3d at 696.

In this case, the claims by the Plaintiffs against the Corporate Defendants include: civil conspiracy regarding the breach of Neilson's and other employees confidentiality agreements and the breach of Neilson's fiduciary duties; tortious interference with confidentiality contracts of the former employees; aiding and abetting a breach of Neilson's fiduciary duties; and tortious interference with prospective business expectancy or prospective business relationship

regarding interference with business relationships. The Petition does not reference the Agreement in any way other than to provide factual information.

None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims raised in the Petition, the arbitration clause in the Agreement is not applicable. The denial of the motion to stay by the trial court is affirmed.

Conclusion

The judgment of the trial court is affirmed. None of the claims by the Plaintiffs are covered by an arbitration agreement. Neilson did not sign the Employment Letter; therefore, there is no "agreement in writing" "signed by the parties" as required by the Convention. The claims brought by the Plaintiffs against the Corporate Defendants do not arise out of, relate to, or are connected to the Asset Purchase Agreement; thus, they are not subject to the arbitration clause found therein.

/s/ Victor C. Howard
Victor C. Howard, Chief Judge

Spinden and Holliger, JJ., concur

APPENDIX B — JUDGMENT AND ORDER OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY DATED DECEMBER 21, 2006

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 0516-CV27278

Seaboard Corporation, et al.,

Plaintiffs,

vs.

Grindrod Limited, et al.,

Defendants.

JUDGMENT AND ORDER

For the reasons stated in this court's order dated October 23, 2006, a copy of which is appended hereto, it is adjudged and decreed that the defendants Kevin Neilson, Grindrod International Limited and Atlas Shipping and Trading Limited have failed to provide [sic] the existence of any valid or pertinent arbitration agreement that would subject or require the arbitration of any of plaintiffs' claims raised in this lawsuit. Accordingly, Defendants' Motion to Stay Proceedings Pending Resolution of Petition To Compel Arbitration is DENIED. The parties will litigate plaintiffs' claims in this lawsuit.

It is further ordered that this Judgment and Order is immediately appealable pursuant to the Federal Arbitration Act, 9 U.S.C. § 16 and Rule 74.01(b) of the Missouri Rules of Civil Procedure and that there is no just reason for delay of an appeal of this Judgment and Order denying Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration.

IT IS SO ORDERED.

Date: 12/21/06

/s/ SANDRA C. MIDKIFF
Sandra C. Midkiff, Circuit Judge

APPENDIX C — ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION TO COMPEL ARBITRATION IN NEW YORK DATED OCTOBER 23, 2006

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 0516-CV27278
Division 1

Seaboard Corporation, et al.,

Plaintiffs,

v.

Grindrod Limited, et al.,

Defendants

ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION TO COMPEL ARBITRATION IN NEW YORK

This case comes before the Court on the Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York, filed on August 18, 2006. After consideration of the motion and suggestions filed by the parties, the Court now makes the following findings and orders:

Appendix C

Factual Background

On April 12, 1999, Kevin Neilson began working with Seaboard Overseas Limited (SOL), as Executive Vice-President and General Manager. As [sic] SOL, Neilson was internally classified as a foreign service employee because his job duties required him to perform his duties in Bermuda. SOL issues employment offer letters to all foreign service employees; however, it does not issue employment offer letters to employees whose job duties are based in the United States. In December 2000, Neilson relocated to North Carolina from Bermuda. SOL sent Neilson a new foreign service offer letter in January of 2001 because of his relocation. The letter stated that Neilson remained as a foreign service employee and was still required to perform his same job duties in Bermuda. SOL signed the foreign service offer letter and set [sic] it to Nielson. Nielson, however, never signed or returned the letter to SOL.

On July 1, 2002, Neilson left SOL and took a job as Vice-President of Grains and Trading for Seaboard Overseas and Trading Group (SOTG). SOTG does not issue employment agreements or offer letters with arbitration clauses to domestic employees whose job duties are based in the United States. Neilson relocated to the Kansas City area and worked in Kansas as a domestic employee of the SOTG division of Seaboard Corporation until he resigned on April 27, 2005.

In approximately January 2005, Neilson was approached by Grindrod, South Africa's leading shipping

and logistics company about pursuing a joint venture with or acquiring the assets of plaintiff's profitable overseas shipping and trading business. Plaintiffs allege in this lawsuit, that Neilson engaged in secret negotiations with Grindrod to implement a conspiracy to force Plaintiffs to transfer their overseas business and that in fact Plaintiffs were forced to transfer SOL's overseas business to Grindrod for a price far below fair market value. In this lawsuit, plaintiffs raise claims that Neilson breached his fiduciary duties, the confidentiality agreement that he signed, and committed various other tortious acts.

Procedural History:

Plaintiffs originally filed this lawsuit in the Circuit Court of Jackson County, Missouri on August 26, 2005. Neilson was personally served on October 27, 2005. Neilson filed his Notice of Removal on December 8, 2005. Grindrod International Limited (GIL) and Atlas Trading & Shipping Limited (Atlas) were served through the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters on January 19, 2006 and January 10, 2006 respectively. On January 27, 2006, Atlas and GIL filed a Supplemental Notice of Removal and Consent to Removal. On December 22, 2005, Plaintiffs filed a Motion to Remand Neilson's removed case back to the Circuit Court. On February 16, 2006, Plaintiffs filed a Motion to Remand Atlas and Grindrod's case back to this Circuit Court. On August 1, 2006, Judge Gaitan granted Plaintiffs' Motions to Remand this case, after concluding

that the federal district court lacked subject matter jurisdiction over the claims raised in this case. Judge Gaitan based his conclusion on his review of the undisputed facts of the case. He found that (1) there was no valid written signed agreement to arbitrate existing between plaintiffs and Neilsen; and (2) plaintiffs' claims in this case do not arise out of the Asset Purchased Agreement between Plaintiff SOL and Defendants Grindrod and Atlas. Thus, he concluded, defendants failed to demonstrate that there are pertinent arbitration agreements, and consequently, there was no federal subject matter jurisdiction over the claims raised in this lawsuit.

Following the remand of this case to this court, Defendants' filed a Motion to Stay Proceeding Pending Resolution of Petition to Compel Arbitration in New York in this Court on August 18, 2006. Defendants' claim that New York is the proper forum for adjudication because there is a valid and enforceable arbitration provision in both of the contracts that govern the relationships between the parties. Defendant's Petition filed in the Supreme Court of New York seeks to compel arbitration of plaintiffs' claims herein pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 206.

Appendix C

Applicable Law:

Defendant Neilson's Petition to Compel Arbitration filed in the Supreme Court of New York asks the Court to direct the Respondents (Seaboard Corporation) to arbitrate their claims against Petitioners asserted in the complaint in New York pursuant to the Asset Purchase Agreement and the Employment Contract between Neilson and Seaboard. Defendants base their claim for arbitration on 9 U.S.C. § 206, the Convention of the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. § 4, the Federal Arbitration Act. 9 U.S.C. § 206 states:

> A court having jurisdiction under this may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Article II of the Convention further states: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."

9 U.S.C. § 4 provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

> under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter in a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

The Eighth Circuit has stated of the Federal Arbitration Act that,

> As to whether 'the making of the agreement for arbitration' is in issue, *id.*, our Circuit has refined this inquiry to asking 1) whether the agreement for arbitration was validly made and 2) whether the arbitration agreement applies to the dispute at hand, i.e., whether the dispute falls within the scope of the arbitration agreement. *Medcam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005).

Discussion:

Here, Defendants propose [sic] seek to stay all activity in the case pending before this Court, pending the outcome of the Supreme Court of New York Petition regarding the issue of whether or not the parties should be compelled to participate in arbitration. Defendants argue that New York is the property forum for adjudication of these issues, despite the fact that the

instant action was commenced prior in time, and despite the fact that the U.S. District Court for the District of Missouri, Western Division, has already concluded that (1) there is no written agreement for arbitration existing between Neilson and the plaintiffs; and (2) the claims raised by plaintiffs against Atlas and Grindrod do not arise out of the Assets Purchase Agreement.

This court already has jurisdiction over the parties and claims asserted by the parties in this case. Defendants argue that this court cannot and should not be bound by the findings or rulings of the district court. This court now re-examines the issues previously raised by defendants relating to their attempts to compel arbitration under the Assets Purchase Agreement and the Employment Agreement on which they rely. The decision turns on the question of whether or not the alleged facts of Plaintiffs' Petition fall under the arbitration clause contained in the January 1, 2001 foreign service offer letter sent from SOL to Kevin Neilson and the Asset Purchase Agreement dated May 24, 2005 between Seaboard Overseas Limited and Atlas and Grindrod.

1. *Agreement between Plaintiff SOL and Neilson*: This Court must first determine whether or not there was a valid agreement between the parties that would create a duty to arbitrate the complaints alleged in Plaintiffs' Petition. The undisputed facts show that Neilson was sent a foreign service offer letter on January 1, 2001 after he relocated from Bermuda to North Carolina in December 2000. Neilson was to

maintain his duties as a foreign service employee in Bermuda. The offer letter was sent by SOL and it contained an arbitration clause. Neilson did not sign the foreign service offer letter and failed to return the letter to SOL. Soon thereafter (in July of 2002) Neilson *left* SOL and became the Vice-President of SOTG, and was classified as a domestic employee. SOTG did not issue employment agreements or offer letters with arbitration clauses to domestic employees whose job duties are based in the United States. Neilson never signed the foreign service offer letter. In *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999), *abrogated on other grounds, Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir, 2005), the Court concluded that because plaintiff and defendant did not have an arbitration agreement in writing, the arbitration clause was not binding.

Based on these undisputed facts, there was no written agreement in place that would subject Plaintiff to the arbitration clauses in this case. Further, Neilson became a domestic employee in 2002, when he signed on as Vice-President at SOTG. The letter no longer applied when Neilson left his job at SOL. The complaints that Plaintiffs allege in their Petition occurred long after Neilson had left his position as Executive Vice President of SOL.

2. *Asset Purchase Agreement between SOL and Grindrod and Atlas*: With regard to Defendants GIL and Atlas, Plaintiffs in their Petition, assert allegations of facts against these two defendants that occurred

before the Asset Purchase Agreement was even signed. The Asset Purchase Agreement contains a clue which states as follows:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.

Section 9.07(a).

The word "dispute" as used in the preceding paragraph is defined in the Agreement as follows:

> Any dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

Plaintiffs state that the entireties of their claims are based on conduct of Atlas and GIL that occurred from January 2005 to May 2005—before the Asset Purchase Agreement was signed. Defendants argue that the broad arbitration clause contained in Section 9.07 stating that "the parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes,

including Disputes over arbitrability or jurisdiction" subjects the plaintiffs to arbitration for their claims. In *Clarus Med. v. Myelotec, Inc.*, 2005 U.S. Dist. LEXIS 30540, the Court stated that "an Order to compel arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Plaintiffs' claims in this case do not relate to the Asset Purchase Agreement, but rather to the conduct that preceded the signing of the document. In Plaintiffs' Petition, they have alleged claims against GIL and Atlas of involving civil conspiracy, tortuous interference with contract, aiding and abetting a breach of fiduciary duty and tortuous interference with prospective business expectancy or prospective business relationship. This Court finds that the alleged claims in Plaintiffs' Petition do not fall within the Asset Purchase Agreement; Plaintiffs' claims do not arise from the Asset Purchase Agreement.

Additionally, plaintiffs correctly assert that the Asset Purchase Agreement does not apply to all parties in this action. Only SOL, Atlas and GIL are parties to the Asset Purchase Agreement. There is no contractual obligation compelling Seaboard Corp. and SOTS to arbitrate. These separate corporate entities are not parties to any valid agreement to arbitrate. Because the Convention does not apply and there is no arbitration clause that requires all or any plaintiffs to arbitration, the Defendants' motion to Stay Pending Resolution of

Petition to Compel Arbitration in New York should be denied.

IT IS HEREBY ORDERED that Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York is DENIED. The parties will litigate plaintiffs' claims, as well as any arbitration claims asserted by defendants, in this lawsuit.

IT IS FURTHER ORDERED that a Case Management Conference is now set for December 11, 2006 at 10:00 a.m., at which tie lead trial counsel should be present, and should be prepared to discuss a proposed pretrial schedule, a firm trial setting and any pending pretrial motions that are ripe for ruling.

IT IS SO ORDERED.

/s/ SANDRA C. MIDKIFF
Sandra C. Midkiff, Circuit Judge

Date: October 23, 2006

APPENDIX D — RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object or promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within

the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that the results in part from differences of expression as between the five equally authentic tests of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign

---

[1] United Nations, *Treaty Series*, vol. 330, No. 4739.

arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favorable than the Convention,

Considering the wide use of electronic commerce.

Take into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations

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[2] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

Appendix D

Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[6] General Assembly resolution 60/21, annex.

APPENDIX E — ORDER OF THE SUPREME COURT OF MISSOURI DENYING APPLICATION TO TRANSFER DATED APRIL 15, 2008

IN THE SUPREME COURT OF MISSOURI

SC89170
WD67628
January Session, 2008

Seaboard Corporation, et al.,

Respondents

v.

Grindrod Limited, et al.,

Appellants

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri court of Appeal, Western District, it is ordered that the said application be, and same is hereby denied.

Breckinridge, J., not participating.

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No. 08-65

Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KEVIN NEILSON, *et al.*,

Petitioners,

v.

SEABOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Supreme Court grant Petitioners' *writ* to reconsider the Missouri Court of Appeals' determination that Petitioner Neilson's undisputed failure to ever sign an employment agreement for a prior overseas position with a previous employer, as explicitly required by the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is fatal to any attempt to compel arbitration for conduct arising four years after leaving his prior employer?

2. Does a fourteen-year-old opinion by a single circuit court, an opinion which has been soundly rejected by the only two other circuit courts that have considered the same issue, provide compelling reasons for this Court to reconsider the decision by the Missouri Court of Appeals when Petitioners failed to raise or cite to the purported split in any briefing before the Missouri Court of Appeals?

3. Have Petitioners presented any compelling reasons for this Court to reconsider a mixed factual and legal decision by the Missouri Court of Appeals decided pursuant to Missouri law holding that Petitioners have failed to properly allege the existence of any arbitration agreement relevant to any of Respondents' claims?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following were parties to the proceedings before the Missouri Court of Appeals for the Western District:

Seaboard Corporation
Seaboard Overseas Limited
Seaboard Overseas Trading and Shipping (Proprietary) Limited

Seaboard Corporation's shares are publicly traded on the American Stock Exchange. It has no parent and no publicly held company owns 10% or more of Seaboard Corporation's stock. Seaboard Overseas Limited and Seaboard Overseas Trading and Shipping (Proprietary) Limited are directly or indirectly wholly owned subsidiaries of Seaboard Corporation. Other than Seaboard Corporation, no publicly held company owns 10% or more of Seaboard Overseas Limited's or Seaboard Overseas Trading and Shipping (Proprietary) Limited's stock.

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APPLICABLE TREATIES AND STATUTES

The Petition invokes two applicable sources of law: the Federal Arbitration Act ("FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). The relevant provision of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Convention is a United Nations' agreement that is incorporated and adopted by the FAA. *See* 9 U.S.C. § 201 (stating that the Convention "shall be enforced in United States courts in accordance with this chapter."). There are two sections of the Convention relevant to this Petition. Article II(2) of the Convention states:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Article VII(1) of the Convention further states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

The FAA is applicable to arbitration agreements governed by the Convention, but only to the extent that the FAA and the Convention do not conflict. The FAA provides:

> Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter [the Convention] to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 208.

STATEMENT OF THE CASE

I. OVERVIEW OF RESPONDENTS' UNDERLYING CLAIMS

Respondents consist of three entities: Seaboard Corporation ("Seaboard"), Seaboard Overseas Limited ("SOL"), and Seaboard Overseas Trading and Shipping (Proprietary) Limited ("SOTS"). Seaboard is a Delaware corporation with its principal place of business in Merriam, Kansas (a suburb of Kansas City). SOL is a subsidiary of Seaboard with its principal place of business in Bermuda. Although not a named party, Seaboard Overseas & Trading Group ("SOTG"), a division of Seaboard, is also referenced throughout these proceedings.

In the underlying litigation, Respondents allege that in early 2005, Seaboard entrusted Petitioner Kevin Neilson ("Neilson") with negotiating a potential business transaction with Grindrod Limited ("Grindrod") on Seaboard's behalf. During the course of those negotiations and unbeknownst to Respondents, however, Neilson, Grindrod, and other members of Grindrod's corporate family conspired to lure away Seaboard's key employees and most of Seaboard's customers. On May 8, 2005, most of Seaboard's key employees resigned en masse, pursuant to Petitioners' secret plan, and immediately joined a subsidiary of Grindrod. In furtherance of this conspiracy, Neilson, while still employed by Seaboard, disclosed confidential information, including crucial financial, employee and customer information, to the other Petitioners that allowed Petitioners to implement their secret plan. Only

after the occurrence of this wrongful conduct and the resulting injury, SOL entered into an Asset Purchase Agreement selling certain assets to Petitioners Grindrod International Limited ("GIL") and Atlas Trading & Shipping Limited ("Atlas").

In August 2005, Respondents filed suit against Neilson, Grindrod, GIL, Atlas and Unicorn Shipping (Proprietary) Limited ("Unicorn"). Respondents filed their Petition in the Circuit Court for Jackson County, Missouri ("Circuit Court") and alleged the following nine causes of action: fraud, negligent misrepresentation, breach of fiduciary duty, misappropriation of corporate opportunities and breach of confidentiality agreements against Neilson; civil conspiracy against Neilson and all Grindrod-related companies; tortious interference with contract and aiding and abetting a breach of fiduciary duties against Grindrod and Atlas; and tortious interference with prospective business expectancies against Neilson, Grindrod and Atlas. All of Respondents' causes of action are based upon conduct and the resulting injury that occurred prior to the execution of the Asset Purchase Agreement. None of Respondents' claims seek to enforce, construe, or rescind the Asset Purchase Agreement in any manner.[1]

---

1. Of the eight named parties involved in this lawsuit, Petitioners allege that only four parties, SOL, Neilson, GIL and Atlas, are even potentially subject to arbitration agreements. Petitioners do not allege the existence of any arbitration agreements relevant to Seaboard, SOTS, Grindrod or Unicorn.

II. FACTUAL HISTORY

A. Neilson's Employment with Respondents

In April 1995, Neilson began working in Kansas City as Vice President for Seaboard Commodity Trading, Ltd. In March 1999, Neilson accepted a position with SOL to become its Executive Vice President and General Manager. In his new role with SOL, Neilson was transferred to Bermuda. During his employment with SOL in Bermuda, SOL classified Neilson as a foreign service employee because Neilson was required to perform his job duties outside of the United States. It is SOL's practice to issue employment letters to all foreign service employees. SOL does not have employees based in the United States.

In December 2000, Neilson moved from Bermuda to North Carolina. As a result of his relocation and to reflect his new domicile, SOL sent Neilson a foreign service employee offer letter on or about January 1, 2001. The employment letter was issued on SOL letterhead with SOL's Bermuda address. The letter identified SOL as "the Company" and identified Neilson as an expatriate whose work with SOL was contingent on his ability to maintain a work permit in Bermuda. Paragraph three of the letter required Neilson to perform *all* of his duties "outside the United States and in *no* circumstance can you perform *Duties* while *physically in the United States*." (emphasis added).

SOL's employment letter also contained the arbitration provision at issue in this Petition. The arbitration provision states in part:

> Any dispute between any of the parties hereto or claim by a party against another party arising out of or in relation to this agreement or in relation to any alleged breach thereof shall be finally determined by arbitration in accordance with the rules then in force of the American Arbitration Association by a panel of three arbitrators. The arbitration proceedings shall take place in New York, New York or such other location as the parties in dispute hereafter may agree upon; and such proceedings will be conducted in the English language and shall be governed by the laws of Bermuda.

In January 2001, SOL signed the employment letter and sent it to Neilson for his approval because it was then Neilson's intent to work exclusively overseas. It is undisputed by the parties that Neilson moved to Seaboard's Kansas City offices in 2002 and never signed or returned the SOL employment letter to Seaboard.

In July 2002, when Neilson moved to Kansas City, Neilson became the Vice President of Grains and Trading for SOTG, a division of Seaboard. Thus, as of July 2002, Neilson lived in the Kansas City metropolitan area and worked out of Seaboard's corporate headquarters in Kansas for SOTG. Because he was now performing his duties *in* the United States for SOTG, Neilson was classified as a domestic employee of Seaboard's SOTG division. Neilson did not and could

not perform "all duties" outside the United States as his January 2001 employment letter, if executed, would have required.

Neilson's new role with SOTG was documented in a SOTG interoffice memorandum in July 2002 that stated, "Effective July 1, 2002, Kevin Neilson has transferred to Kansas City as Seaboard Overseas and Trading Group Vice President Grains and Trading." The memorandum was issued on SOTG letterhead and the subject was "Seaboard Overseas and Trading Group Personnel Changes." Additionally, Neilson helped draft a description of his new job duties with SOTG and at Neilson's request, SOTG issued to Neilson new business cards reflecting that he was a SOTG employee.

SOTG does not issue employment letters, employment agreements or arbitration agreements to domestic employees whose job duties are based within the United States. Consequently, there is neither an offer letter nor an employment contract with Neilson for his position with the SOTG division of Seaboard. Neilson continued to serve as the Vice President of Grains and Trading for SOTG until he resigned on April 26, 2005. All of Respondents' causes of action are based upon conduct occurring in 2004 and 2005, more than two years after Neilson left his employment with SOL and began his employment in Kansas City with Seaboard's SOTG division.

B. Asset Purchase Agreement Between SOL, GIL and Atlas

After Petitioners' tortious conduct occurred and in May 2005, SOL sold certain assets to GIL and Atlas. GIL, Atlas and SOL thereby executed an Asset Purchase Agreement ("the Agreement"). The Agreement contained an arbitration provision that stated in part:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.

In another section, the Agreement defines "Dispute" as:

> [A]ny dispute, controversy, or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

III. PROCEDURAL HISTORY

A. Remand Proceedings in the United States District Court

After Respondents filed their Petition in the Circuit Court of Jackson County, Missouri in August 2005, Petitioners removed the lawsuit to the United States District Court for the Western District of Missouri. Petitioners predicated their Notice of Removal on the Convention, claiming that Respondents' claims were subject to arbitration agreements that were governed by the Convention. Disputing the existence of any valid and relevant arbitration agreement, Respondents moved the District Court to remand their Petition to the Circuit Court.

On August 1, 2006, the Honorable Fernando J. Gaitan, Jr., District Court Judge for the United States District Court for the Western District of Missouri, entered an Order granting Respondents' Motions to Remand. Judge Gaitan stated that in order to determine whether federal subject matter jurisdiction existed, "the Court must determine first whether a valid agreement to arbitrate existed between the parties." If a valid agreement existed, then the court had to determine whether a "specific dispute is within the scope of [an] agreement."

Judge Gaitan held that Neilson failed to prove the existence of any valid arbitration agreement. The court found that although SOL signed the employment agreement containing the arbitration clause, Neilson never signed it and the agreement failed to satisfy the

writing requirement under the Convention. Judge Gaitan further found that the employment agreement

> related to Neilson' position as Executive Vice President/General Manager of Seaboard Overseas Limited. . . . [E]ven if plaintiff had signed the letter, the letter no longer applied, because the conduct of which [Respondents] complain occurred long after [Neilson] had left his position as Executive Vice President of SOL in 2002. It is also undisputed that after [Neilson] left his position with SOL and transferred to SOTG, he became a domestic employee and Seaboard does not give offers of employment letters to its domestic employees.

The Court therefore concluded that "[b]ased on an examination of the undisputed facts, the Court finds that there was no agreement [to arbitrate] . . ."

In analyzing the arbitration clause in the Asset Purchase Agreement, the court initially noted that it should compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Mindful of this high standard, the court examined the arguments made by Atlas and GIL, ultimately finding that Petitioners failed to prove the existence of any arbitration agreement relevant to any allegations in Respondents' Petition:

> [Respondents]' claims do not arise out of the Asset Purchase Agreement. The Asset

> Purchase Agreement defines a dispute as all claims 'arising out of, relating to, or connected with' the Agreement. [Respondents'] claims do not relate to the Agreement. [Respondents] have asserted claims against Atlas and Grindrod involving civil conspiracy, tortious interference with contract, aiding and abetting a breach of fiduciary duty and tortious interference with prospective business expectancy or prospective business relationship. They are not seeking in their petition to enforce or rescind the Agreement, nor are they seeking damages for a breach of the Agreement. Therefore, the Court finds that the [Respondents]' petition does not fall within the scope of the Arbitration clause contained in the Asset Purchase Agreement.

Based on this reasoning, Judge Gaitan remanded the lawsuit back to the Circuit Court.

B. The New York Litigation

After Judge Gaitan remanded the lawsuit, on August 17, 2006, Petitioners filed a separate Petition to Compel Arbitration in the Supreme Court of New York for the County of New York. In their New York Petition, Petitioners raised the same issues that had previously been resolved by Judge Gaitan in his Order remanding the case to the Circuit Court.

C. Petitioners' Motion in the Circuit Court of Jackson County

On August 18, 2006—one day after they filed their New York Petition—Petitioners filed in the Circuit Court of Jackson County their Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York. In their Motion, Petitioners requested that the Circuit Court stay the underlying proceedings pending the outcome of the New York litigation.

Just as Judge Gaitan had, the Circuit Court rejected Petitioners' arguments. In an Order dated October 23, 2006, the Honorable Sandra C. Midkiff determined that the arbitration clauses cited by Petitioners were not applicable to the litigation. Regarding Neilson's attempt to compel arbitration, Judge Midkiff found "there was no written agreement in place that would subject [Respondents] to the arbitration clause in this case" because Neilson never signed it. Judge Midkiff also noted that the "letter no longer applied when Neilson left his job at SOL" in 2002. Thus, Judge Midkiff determined that the arbitration provision contained in Neilson's employment letter was wholly inapplicable to this litigation.

Regarding the Asset Purchase Agreement, Judge Midkiff concluded "[Respondents]' claims in this case do not relate to the Asset Purchase Agreement, but rather to the conduct that preceded the signing of the document." Moreover, Judge Midkiff noted that "the Asset Purchase Agreement does not apply to all parties in this action. Only SOL, Atlas and GIL are parties to the Asset Purchase Agreement. There is no contractual

obligation compelling Seaboard Corp. and SOTS to arbitrate."[2]

In a subsequent Judgment and Order dated December 21, 2006, Judge Midkiff held that her previous Order "is immediately appealable pursuant to the Federal Arbitration Act, 9 U.S.C. § 16 and Rule 74.01(b) of the Missouri Rules of Civil Procedure and that there is no just reason for delay of an appeal of this Judgment and Order . . ." Petitioners subsequently filed their Notice of Appeal with the Missouri Court of Appeals for the Western District.

D. The Missouri Court of Appeals' Decision

On appeal, Petitioners argued that the arbitration clause in Neilson's employment letter satisfied the writing requirement of the Convention and that the letter constituted an "exchange of letters or telegrams" that brought it within the Convention's definition of an "agreement in writing." The Missouri Court of Appeals unanimously rejected these arguments and held that Neilson's employment letter did not satisfy the Convention's requirements because Neilson never signed it. Moreover, the Missouri Court of Appeals rejected Petitioners' argument that the employment letter was an "exchange of letters or telegrams."

---

2. Petitioners' *writ* was filed on behalf of only three of the five Defendants in the underlying litigation, Neilson, GIL and Atlas. Petitioners do not allege that Grindrod and Unicorn have any applicable arbitration agreements with any Respondents. Therefore, as Judge Midkiff correctly determined, regardless of any final orders regarding arbitration, certain parties and certain claims in this lawsuit will proceed in Missouri state court.

Because the Court found that the employment letter did not satisfy the Convention's writing requirement, it never addressed whether the SOL employment letter, even if executed, remained effective against Neilson, as a domestic employee, in his new position with SOTG in Kansas City. *See* Pet. at 5a n.4.[3]

Regarding the Asset Purchase Agreement, the Court of Appeals unanimously agreed with the findings of Judge Gaitan and Judge Midkiff and held:

> None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims in the Petition, the arbitration clause in the Agreement is not applicable.

Pet. at 11a.

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3. Respondents note that this separate and independent ground for denying Petitioners' attempts to compel arbitration means that any decision by this Court will not fully resolve whether Respondent SOL's (Seaboard and SOTS never had an employment agreement with Neilson) claims against Neilson must be arbitrated. The Missouri Court of Appeals specifically declined to even reach this additional, independent basis to find that the arbitration clause, which is from Neilson's prior position with a previous employer, has any application to this lawsuit. *See* Pet. at 5a n.4. These remaining, outstanding grounds to deny arbitration further weigh in favor of denying this Petition.

E. The Missouri Supreme Court Declines Transfer

After the three-judge panel of the Missouri Court of Appeals issued its unanimous opinion, Petitioners moved for rehearing and transfer to the Missouri Supreme Court. The Missouri Court of Appeals *en banc* denied Petitioners' request for rehearing and the Missouri Supreme Court ultimately denied Petitioners' motion for transfer. *See* Pet. at 29a.

REASONS FOR DENYING THE PETITION

Three separate courts, the Federal District Court for the Western District of Missouri, the Circuit Court of Jackson County, Missouri and the Missouri Court of Appeals, have considered the merits of Petitioners' arguments and unanimously rejected them. The Missouri Court of Appeals for the Western District sitting *en banc* and the Missouri Supreme Court declined even to review these substantive rulings. Unable to obtain relief in any of these courts, Petitioners now seek relief from this Court.

Petitioners' *writ* should be denied because Petitioners fail to present any "compelling reasons" for review from this Court. S. Ct. R. 10(a). The Missouri Court of Appeals did not "decide[] an important federal question" that warrants the review of this Court, it did not rule on the validity of a federal or state statute, and it did not issue any novel rule of law that has any import beyond the facts of this particular dispute. Instead, the decision of the Missouri Court of Appeals is confined to the unique facts of this case alone, and the decision fails to raise any basis for issuing a *writ of certiorari* under Supreme Court Rule 10. For the reasons set forth herein, the Petition should be denied.

I. PETITIONERS FAIL TO ARTICULATE ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' DETERMINATION THAT PETITIONER NEILSON HAD NO VALID ARBITRATION CLAUSE WITH RESPONDENTS.

In reviewing the undisputed facts that Petitioner Neilson never signed any employment agreement and never exchanged any letters or telegrams regarding his employment agreement, the Missouri Court of Appeals correctly determined that "there was no applicable arbitration clause between Neilson and the Plaintiffs." *See* Pet. at 6a, 8a. Despite this correct holding, Petitioners ask this Court to instead apply certain terms from the FAA in clear contradiction of the Convention. Petitioners also attempt to manufacture a circuit split, based on a single circuit court opinion from fourteen years ago that has been rejected by the only two other circuit courts that have considered similar issues. Petitioners' arguments provide no compelling basis for this Court to grant their *writ.*

A. The Missouri Court of Appeals correctly determined that Neilson has no written arbitration agreement recognized by the Convention or the FAA.

1. Petitioners Do Not Challenge the Missouri Court of Appeals' Determination that the Convention Does Not Apply to Neilson's Unsigned Employment Letter.

The Convention defines an "agreement in writing" as an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *See* Convention at Article II(2). Applying the express language of the Convention, the Missouri Court of Appeals correctly determined that to be enforceable under the Convention, any arbitration agreement must be signed by the parties or be contained in an exchange of letters or telegrams. *See* Pet. at 6a; *see also Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999), *abrogated on other grounds Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005); *Czarina, LLC v. W.F. Poe Syndicate*, 254 F. Supp. 2d 1229, 1236 (M.D. Fla. 2002), *aff'd* 358 F.3d 1286 (11th Cir. 2004); *Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1052 (W.D. Wash. 2000); *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882-83 (S.D.N.Y. 1991).

The Missouri Court of Appeals' opinion correctly concluded that Neilson's employment letter does not satisfy the Convention's writing requirement because

it is undisputed that Neilson "never signed or returned the letter." Pet. at 6a. The Missouri Court of Appeals further correctly determined that Petitioners have wholly failed to provide any authority or factual basis supporting their naked claim that there was any "exchange of letters or telegrams" sufficient to satisfy the requirements of the Convention. *See* Pet. at 6a-8a.

2. The FAA Does Not Trump the Convention's Writing Requirement.

Rather than challenge these rulings, Petitioners now argue that the Missouri Court of Appeals "failed to address their alternative argument that the arbitration provision was nevertheless enforceable under Chapter 1 of the FAA, 9 U.S.C. § 2" because the FAA "contains no requirement that a contract be signed in order for its arbitration clause to be enforceable." Pet. at 18. Petitioners' interpretation of the FAA fails because it improperly places the FAA in direct conflict with the clear requirements of the Convention.

By its own explicit terms, the FAA only applies "to the extent [the FAA] is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Thus, the FAA requires that when the FAA and the Convention conflict, the Convention's standards prevail. *See id.*; *see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005) (holding that the FAA was not applicable to a case governed by the Convention, and citing section 208 for the proposition that the FAA and the Convention "provide overlapping coverage to the extent they do not conflict"); *McDermott Int'l, Inc. v.*

Lloyd's Underwriters of London, 120 F.3d 583, 588 (5th Cir. 1997) (holding that the FAA was not applicable to a case governed by the Convention because the two provisions were in conflict, and noting that the FAA is the "approximate domestic equivalent of the Convention . . . except where the FAA conflicts with the Convention Act's few specific provisions."); *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996) (same).

To argue that courts can look to the FAA's writing requirement where an arbitration provision fails under the Convention's standards, Petitioners cite Article VII(1) of the Convention and the corresponding recommendation of the United Nations Commission on International Trade Law ("UNCITRAL"). Article VII(1) of the Convention states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement ***of arbitral awards*** entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself ***of an arbitral award*** in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

(emphasis added). On its face, Article VII applies only to arbitration awards – not agreements – and it preserves the rights of award recipients to enforce the award in the manner prescribed by "the law or the treaties of the country where such award is sought to

be relied upon." Because the Convention preserves those rights vis-à-vis arbitration awards does not change the definition of what constitutes an enforceable arbitration provision under Article II. Indeed, if the Article II drafters wanted the writing requirement of each signatory country to apply, then they would have added language comparable to the provision found in Article VII. They did not, and any discussion of Article VII related to the Convention's writing requirement is inapposite.

Petitioners cite no additional authority supporting their contention that if an arbitration provision does not satisfy the Convention's writing requirement, then courts can look to the FAA's relaxed writing requirement as an alternative basis for enforcing the provision. Instead, Petitioners' arguments undermine the fundamental purpose of the Convention. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to . . . unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 2457 (1974) (internal quotations omitted). If the FAA and the arbitration statutes of individual signatory countries can supplant the Convention's explicit signature requirement, then the Convention's purpose of creating unifying standards for international arbitration agreements will be subverted. Indeed, Petitioners' unsupported argument would render the Convention's signature requirement superfluous and unnecessary. *See Hibbs v. Winn*, 542 U.S. 88, 89, 124 S. Ct. 2276, 2279 (2004) ("the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is render superfluous").

To conclude that the FAA's relaxed signature requirement serves as an alternative to the Convention's explicit signature requirement would render Article II of the Convention meaningless and undermine the purpose of the Convention. Because the arbitration provision in Neilson's employment letter does not satisfy the Convention, and because the FAA's relaxed signature requirement cannot apply to it, the provision is unenforceable, and the Court should deny the Petition.

B. THERE IS NO RELEVANT SPLIT OF AUTHORITIES AMONG THE CIRCUIT COURTS.

For the very first time in their Petition, Petitioners allege the existence of a purported split of authorities regarding how federal circuits interpret and apply the Convention. Petitioners never alleged the existence of a purported circuit split to the Missouri Court of Appeals[4] or even cited to *Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), the Fifth Circuit decision from 1994 Petitioners now claim

4. Petitioners' failure presumably would explain their non-compliance with Sup. Ct. R. 14, which directs petitioners seeking review of a state-court judgment to specify "when the federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." SUP. CT. R. 14(g)(i). Petitioners cannot point the Court to any provisions in the record where they raised *Sphere Drake* or the purported circuit split because they failed to do so. As a result, the Missouri Court of Appeals did not render a decision on this point for the Court to review.

is the basis for this circuit split, in any of their briefing. Because Petitioners never raised the issue or directed the Missouri Court of Appeals to *Sphere Drake*, the Missouri Court did not render a decision on that point or make any findings regarding the circuit split now identified by Petitioners. The opinion from the Missouri Court of Appeals is therefore silent on this issue.

Petitioners previously failed to cite to *Sphere Drake*[5] because this fourteen-year-old opinion has been soundly rejected by the only two other circuit courts that have addressed this narrow issue. After extensive analysis, the Courts of Appeals for both the Second and Third Circuits rejected *Sphere Drake*'s conclusion, holding that the Convention's signature requirement applies to both arbitral clauses in a contract and in arbitration agreements. *See Standard Bent*, 333 F.3d at 449 ("We agree with the Court of Appeals for the Second Circuit. . . . Thus, the plain language provides that an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters."); *Kahn Lucas*, 186 F.3d at 217-18 ("Indeed, this comma can serve no other grammatical purpose. As a result, [*Sphere Drake*]'s reading of the statute would render the comma mere surplusage, a construction frowned upon. . . . Upon review of the Convention's text, punctuation and subject

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5. In *Sphere Drake*, the court concluded with limited analysis that the phrase "signed by the parties or contained in an exchange of letters or telegrams" modified the precedent "arbitration agreement" but not "arbitral clause in a contract." 16 F.3d at 669-70. Thus, according to *Sphere Drake*, an arbitration provision in an otherwise enforceable contract that is not signed is still enforceable, and only a stand-alone arbitration agreement must satisfy the signature requirement. *Id.*

matter, as well as an examination of the Convention's legislative history, we hold that the modifying phrase 'signed by the parties or contained in an exchange of letters or telegrams' applies to both 'an arbitral clause in a contract' and 'an arbitration agreement.'" (internal citations omitted)).

Not only did Petitioners fail to raise *Sphere Drake* before the Missouri Court of Appeals, but their argument in the underlying appeal was directly contrary to *Sphere Drake* and its holding. Before the Missouri Court of Appeals, Petitioners argued that Neilson's employment letter constituted an "exchange of letters or telegrams" that satisfied the signature requirement of Article II(2) of the Convention. Thus, Petitioners repeatedly sought to invoke the signature requirement of the Convention as a basis for enforcing the arbitration provision. Having lost that argument in the lower courts, they would now disavow the signature requirement and argue that it is inapplicable under the holding of *Sphere Drake*.

This Court has previously stated:

> With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that ***we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. . . .***
>
> The rule serves an important interest of comity. As we have explained, ***it would be unseemly in our dual system of government to disturb***

> ***the finality of state judgments on a federal ground that the state court did not have occasion to consider. . . .***
>
> Our traditional standard also reflects practical considerations relating to this Court's capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but ***also assists us in our deliberations by promoting the creation of an adequate factual and legal record.*** . . . And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 520 U.S. 83, 86-91, 117 S. Ct. 1028, 1029-31 (1997) (emphasis added and internal quotations and citations omitted); *see also Howell v. Mississippi*, 543 U.S. 440, 125 S. Ct. 856 (2005) (dismissing a *writ of certiorari* because the petitioner failed to adequately raise his federal claim before the state court).

In this case, Petitioners never presented the split of authority to the Missouri Court of Appeals, nor did they cite or rely on the holding in *Sphere Drake*. Because the issue was not before it, the Missouri Court of Appeals never rendered a decision on that point. As this Court has previously noted, it would be "unseemly" and in violation of the "important interest of comity" to review a state court ruling on a federal issue when the state court did not have an opportunity to fully adjudicate the matter. *Adams*, 520 U.S. at 86-91, 117 S. Ct. at 1029-31. Because Petitioners raise the split of authority for the first time in their Petition, the Court should deny the Petition.

Even if Petitioners properly presented the circuit split to the Missouri Court of Appeals, the split is not an "important federal question" that warrants this Court's review. Of all of the courts of appeals, only three circuits have addressed how courts should interpret the definition of an "agreement in writing" that is contained in Article II(2) of the Convention. The Fifth Circuit decided *Sphere Drake* in 1994, the Second Circuit decided *Kahn Lucas* in 1999, and the Third Circuit decided *Standard Bent* in 2003. Thus, in the last fourteen years, circuit courts have been presented with the question on only three rare occasions, and there is no evidence that the differences among the circuits are of a magnitude or significance so as to justify this Court's intervention.[6] Petitioners' citation to a fourteen-year-old opinion in an attempt to manufacture a split of authorities among the circuits fails to provide any basis for the Court to grant this Petition.

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6. *See* Kenneth S. Geller & David M. Gossett, *Appeals to the Supreme Court, in* BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 179, 201 § 52:14 (2d ed., Robert L. Haig ed., 2005)

> Review is much more likely if the Court considers the question over which the courts are divided to be "important" (such as the constitutionality of a state or federal statute), or important to the administration of justice (such as the scope of a frequently charged federal crime), or a recurring matter that for which a "uniform rule" is necessary. An issue that arises frequently and over which the lower courts are deeply divided is more likely to be reviewed by the Court than an issue that arises infrequently and over which only two courts are divided – particularly if the infrequently arising issue is not of importance to the functioning of the federal government or the judicial system.

II. THE MISSOURI COURT OF APPEALS' APPLICATION OF THE CONVENTION'S EXPLICIT WRITING REQUIREMENT DOES NOT VIOLATE THE INTENT OF THE CONVENTION OR ANY FEDERAL PUBLIC POLICY.

In the Petition's third argument, Petitioners claim that the Missouri Court of Appeals' application of the explicit language of the Convention requiring an arbitration agreement to be in writing somehow violates the "intention of the Convention" and "Federal Policy." This argument is deeply flawed. The Missouri Court of Appeals followed the "intent" of the Convention by applying its explicit writing requirement. It also followed the underlying policy and intent of the FAA by applying the FAA's plain language, which specifically required the Missouri Court of Appeals to apply the Convention's writing requirement when in conflict with the FAA's provisions.

Petitioners naked claim that "Neilson accepted" SOL's employment letter and "Neilson subsequently tendered and SOL accepted performance thereunder [pursuant to the unexecuted letter agreement] without objection" is a complete distortion of the undisputed factual record that raises no public policy concerns. Pet. at 21-22. In fact, shortly after SOL tendered the letter of employment to Neilson, which he wisely never signed, Neilson elected to perform his job duties in the United States—in direct violation of the proffered letter agreement prohibiting Neilson from performing any duties "while physically in the Untied States." Moreover, the undisputed record confirms that by July 2002— more

than two years *before* any alleged wrongful conduct—Neilson was working in Kansas City as a domestic employee of SOTG, a division of Seaboard. Petitioners' attempt to manufacture facts to support a groundless public policy argument falls far short of justifying review by this Court of the Missouri Court of Appeals' proper application of the plain language the FAA and the Convention. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

III. PETITIONERS FAIL TO PRESENT ANY COMPELLING REASONS TO RECONSIDER THE MISSOURI COURT OF APPEALS' FACTUAL DETERMINATION THAT RESPONDENTS' CLAIMS DO NOT ARISE OUT OF, RELATE TO OR ARE CONNECTED TO ANY ARBITRATION AGREEMENT IN THE ASSET PURCHASE AGREEMENT.

In their final argument, Petitioners assert that the Missouri Court of Appeals' threshold determination that Neilson's arbitration provision was unenforceable under the Convention and that the arbitration agreement in the Asset Purchase Agreement was inapplicable should have been determined by an arbitrator. This issue, decided correctly pursuant to Missouri state law, provides no compelling reason to grant Petitioners' *writ.*

In making its initial determination regarding whether any Petitioner had any agreement to arbitrate, the Missouri Court of Appeals correctly applied Missouri state contract law to determine whether there was any

relevant agreement to arbitrate between the parties. *See* Pet. at 4a; *see also Liberty Mut. Ins. Co. v. Mandaree Public Sch. Dist. # 36*, 503 F.3d 709, 711 (8th Cir. 2007) (courts "apply ordinary state law contract principles to decide whether parties have agreed to arbitrate a particular matter . . ." (quoting *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 242 F.3d 777, 780 (8th Cir. 2001)).

Missouri state law required that *prior* to compelling arbitration, a court must make a threshold determination as to whether an agreement for arbitration was validly made and whether the dispute at hand "falls within the substantive scope of that agreement." *See* Pet. at 4a, 9a-10a; *see also Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) ("Determination whether the parties contractually agreed to arbitration must occur before the parties are forced to submit to arbitration." (citing *Korte Const. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 398 (Mo. Ct. App. 1996)). The Court of Appeals for the Eighth Circuit applies a similar approach to determine whether an agreement for arbitration is enforceable. *See Medcam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005) (in determining whether to compel arbitration, the court must determine "(1) whether the agreement for arbitration was validly made, and (2) whether the arbitration agreement applies to the dispute at hand, i.e., whether the dispute ***falls within the scope*** of the arbitration agreement." (emphasis in original)); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003) ("it is clear that the validity of the arbitration clause and its applicability to the dispute at hand are questions for

the district court to decide"); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994) ("the district court must engage in a limited inquiry to determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the scope of that agreement").[7]

The Missouri Court of Appeals then correctly applied Missouri law:

> Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. Arbitration must be compelled where a tort claim arises directly out of a dispute regarding the terms of the parties' contract. The relationship between the tort claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties. At the very least, ***for a tort claim to be subject to arbitration under a broad arbitration***

7. Other circuit courts similarly require a trial court to initially determine whether an arbitration agreement exists and, if so, whether the dispute falls within the parameters of that agreement. *See Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (noting there is a two-step process for courts to evaluate arbitration clauses with the first step consisting of "determining whether there is a valid agreement to arbitrate between the parties; and . . . whether the dispute in question falls within the scope of that arbitration agreement." (internal quotations omitted)); *Oil Chem. & Atomic Workers Int'l Union (AFL-CIO) v. Conoco, Inc.*, 241 F.3d 1299 (10th Cir. 2001) (remanding to district court so court could determine arbitrability).

> ***clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract. Where a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled.***

Pet. at 9a-10a (emphasis added and internal citations omitted). The Missouri Court then reviewed Respondents' underlying claims and correctly determined that, based on the unique facts of this litigation, none of Respondents' claims reference or relate to the Asset Purchase Agreement in any way. The Court therefore concluded that the arbitration provision in the Asset Purchase Agreement was inapplicable.

> None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims in the Petition, the arbitration clause in the Agreement is not applicable.

Pet. at 11a.

Regarding the arbitration provision in Neilson's employment letter, the Missouri Court determined as a matter of law that the provision was unenforceable on its face because it did not satisfy the requirements of the Convention. Pet. at 5a-8a. The Missouri Court, therefore, never addressed the broader question of whether the underlying causes of action in this specific lawsuit fall within any applicable arbitration agreement. *See* Pet. at 5a.

Despite the Missouri Court of Appeals correctly resolving these factual questions in conformity with Missouri state law, Petitioners now claim that even this minimal threshold determination should have been referred to an arbitrator. In support of their argument, Petitioners cite *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005) and *Terminix Int'l Co. LP v. Palmer Ranch LP*, 432 F.3d 1327 (11th Cir. 2005), which Petitioners claim support their argument that Petitioners' two arbitration provisions manifest a "clear and unmistakable agreement" to refer arbitrability to an arbitrator.[8] The courts in *Contec* and *Terminix* held that where a party incorporates arbitration rules that refer arbitrability to an arbitrator, then that incorporation serves as "clear and unmistakable" evidence of the parties' intention to refer disputes about arbitrability to an arbitrator. Petitioners claim the Missouri Court committed reversible error when they

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8. Petitioners cite *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995) and assert that the Missouri Court's Order conflicts with this case. That case, however, merely sets forth the standard for referring arbitrability to an arbitrator – the Missouri Court did not cite or refute *First Options* in any way.

declined to follow the holdings of *Contec* and *Terminix*.[9] These arguments are incorrect.

As an initial matter, neither *Contec* nor *Terminix* are controlling authority for the Missouri Court of Appeals, and Petitioners cite no authority for the proposition that the Missouri Court was obligated to adopt those decisions as the law of the State of Missouri. In any event, the Missouri Court of Appeals never addressed whether any dispute in this litigation fell within the arbitration clause in Petitioner Neilson's employment letter because the Missouri Court concluded that the arbitration agreement was unenforceable under the Convention. With regard to the Asset Purchase Agreement, the Missouri Court of Appeals similarly decided that on its face, the arbitration agreement contained in that contract was similarly irrelevant to the parties' dispute. These holdings, decided pursuant to the unique facts of this lawsuit and Missouri state law, fail to raise any compelling reasons warranting this Court's review. Petitioners' objections to the Missouri Court of Appeals' factual determinations fail to raise any basis for granting the Petition. *See* SUP. CT. R. 10.

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9. A number of other courts have rejected Petitioners' position. *See Diesselhorst v. Munsey Bldg., L.L.L.P.*, No. Civ. AMD 04-3302, 2005 WL 327532 (D. Md. Feb. 9, 2005) (incorporating AAA Rules does not refer arbitrability to the arbitrator); *Martek Biosciences Corp. Zuccaro*, No. Civ. AMD 04-3349, 2004 WL 2980741 (D. Md. Dec. 23, 2004) (adopting the Judicial Arbitration and Mediation Services ("JAMS") Rules does not refer arbitrability issues to the arbitrator); *In re Tyco Int'l, Ltd.*, No. 02-1335-B, 2004 WL 524429 (D.N.H. March 16, 2004) (incorporating AAA Rules does not refer arbitrability to the arbitrator).

CONCLUSION

A federal district court, a state trial court, and a three-judge panel of the Missouri Court of Appeals have reviewed exhaustive briefing related to Petitioners' arguments and unanimously rejected them in their entirety. Given the opportunity to review those decisions and come to a different conclusion, both the Missouri Court of Appeals for the Western District sitting *en banc* and the Missouri Supreme Court have declined.

The Petition presents no "compelling" or persuasive reason to disturb the decisions of the underlying courts. The Petition does not set forth any split of authority that has been properly preserved for this Court's consideration, nor does it articulate any significant unresolved legal questions that warrant the Court's consideration. At its best, the Petition argues that the Missouri Court of Appeals made an erroneous decision based on the facts of the case, but this is an insufficient basis for granting *certiorari*. Respondents respectfully submit that the Court should deny the Petition in its entirety, and grant any other relief the Court deems just and proper.

Respectfully submitted,

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No. 08-65

IN THE

Supreme Court of the United States

KEVIN NEILSON, GRINDROD INTERNATIONAL LIMITED and ATLAS TRADING AND SHIPPING LIMITED,

Petitioners,

v.

SEABOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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DISCUSSION

Respondents attempt to recast the issues in this petition as unique and unimportant factual disputes, but the truth is that this case presents significant and recurring legal questions about the proper interplay of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In particular, it presents the important question of whether an arbitration provision in an otherwise enforceable contract should be held unenforceable pursuant to the Convention because the contract was not signed by the party seeking to compel arbitration, notwithstanding that the arbitration agreement would be fully enforceable under Chapter 1 of the FAA. The petition also presents the important question of whether a court may perform a "threshold" analysis of the arbitrability of the disputes at issue where the parties have clearly and unmistakably agreed to submit issues of arbitrability to the arbitrators. In sum, the petition for Writ of Certiorari should be granted.

A. *The Relevant Undisputed Facts Fully Support Granting The Petition*

While Respondents repeatedly contend in their opposition brief (*see, e.g.*, Br. 16),[1] that all of the facts relevant to this dispute are "undisputed," this is not accurate.[2] It *is* true, however, that all of the facts

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[1] References to "Br." shall mean Respondents' Brief In Opposition.

[2] Indeed, one of the central disagreements is whether Neilson's Employment Agreement with SOL was in effect at (Cont'd)

relevant to the question of whether to grant this petition are undisputed and that they counsel strongly in favor of so doing. Specifically:

1. Neilson started working for SOL in Bermuda in 1999 and Neilson and SOL both signed an employment agreement dated February 15, 1999, which contained an arbitration agreement identical to the one here at issue calling for arbitration in New York pursuant to arbitration rules of the American Arbitration Association.[3]

2. A new Employment Agreement dated January 1, 2001, also containing an arbitration clause incorporating the AAA Rules was prepared by SOL, duly signed on behalf of SOL, and delivered to Neilson in connection with his continued employment at SOL;

3. Although Neilson did not sign the 2001 Employment Agreement, he did continue to

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(Cont'd)

the relevant time, and that issue turns on the question of whether Neilson's employment with SOL terminated when he moved from North Carolina to Kansas in 2002. Neilson contends that his employment never changed after he joined SOL in 1999 and that the 2001 Employment Agreement, which contained the arbitration clause here at issue, continued to govern up until the time of his resignation in April 2005.

[3] At the time Neilson originally made this motion to the Missouri trial court, he did not have in his possession a copy of this agreement, and so a copy was not part of the record below. It has subsequently been produced by the plaintiffs/respondents in the course of discovery.

work for—and get paid by—SOL thereafter pursuant to its terms.

In other words, it is not legitimately in dispute that there was an employment agreement between SOL and Neilson after January 1, 2001 notwithstanding that Neilson never actually signed the contract. The factual dispute concerns only the question of whether that contract continued to govern after Neilson moved to Kansas in 2002.[4] This issue, however, should not have been passed upon by the courts below. Having established that a contract existed between Neilson and SOL relating to his employment, the question of whether that contract was still in effect and governing at the time of the disputes should have been referred to the arbitrators pursuant to the clear and unmistakable terms of the American Arbitration Association Rules incorporated therein, which provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, *including any objections with respect to the existence, scope or validity of the arbitration agreement.*" (LF 1087)(Emphasis added).

B. *Neilson's Arbitration Agreement Is Enforceable Under The Convention*

Respondents suggest (Br. 17) that Petitioners do not contest the lower court's determination that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* (the

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[4] There is also, of course, the "legal" dispute concerning whether the arbitration provision of that contract is enforceable; that issue is discussed further below.

"Convention"), did not apply to Neilson's Employment Agreement, but this is not the case. Indeed, Petitioners make clear at pp. 19-22 of their Main Brief their position that the Missouri Court of Appeals applied much too narrow an interpretation of the Convention and should have concluded that Neilson's Employment Agreement, which was drafted and signed by SOL, and thereafter tendered to and performed under by Neilson, was an agreement "signed by the parties or contained in an exchange of letters or telegrams" within the meaning of Article II(2) of the Convention. Such a holding is consistent with the broad Federal policy favoring enforcement of agreements to arbitrate (as embodied in Chapter 1 of the FAA and the decisions of this Court), and also with the stated intent of the United Nations Commission on International Trade ("UNCITRAL"), the official United Nations body responsible for unification of the law of international trade.

C. *The FAA Is Not Preempted By The Convention*

Respondents' contention (Br. 18-19) that the Convention preempts Chapter 1 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, reveals a fundamental misunderstanding of the function and interplay of these two bodies of law. Chapter 1 of the FAA, enacted as Federal law in this country long before the Convention, established a Federal policy of encouraging arbitration and a legal framework for enforcing arbitration agreements where Federal interests are implicated (*i.e.*, in cases involving interstate commerce or maritime contracts). *See, e.g.*, 9 U.S.C. §§ 1, 2. The Convention was subsequently drafted and

ratified to foster and encourage the international recognition and enforcement of arbitration agreements and to establish a mechanism for enforcing such agreements.

While the Convention is strikingly similar to Chapter 1 of the FAA, there are some notable differences. First, while a district court has the power under Chapter 1 of the FAA, 9 U.S.C. § 3, to stay an action pending arbitration and has the power under 9 U.S.C. § 4 to compel the parties to arbitrate so long as the place of arbitration is within the district where the court is located, the FAA does not empower the federal court to compel arbitration outside the district. The Convention, by contrast, allows a court to compel arbitration outside the district—including in another country. Similarly, the FAA and the Convention have different timebar provisions, *compare* 9 U.S.C. § 9 with 9 U.S.C. § 207, and somewhat differing standards for when an award may be vacated, with the Convention's list of permissible grounds for *vacatur* being narrower. *Compare* Convention, Art. V with 9 U.S.C. §§ 10, 11.

And, of course, Chapter 1 of the FAA and the Convention have different standards for when an arbitration agreement falls within its scope. Under the FAA an agreement to arbitrate merely must be "written," 9 U.S.C. § 2, whereas the Convention provides that the agreement must be "signed by the parties or contained in an exchange of letters or telegrams." 9 U.S.C. § 201, Art. II(2). Numerous decisions have made clear that the FAA does not require an arbitration agreement to be signed to be enforceable, *see e.g., Interocean Shipping Co. v. Nat'l Shipping and*

Trading Corp., 523 F2d 527, 539 (2d Cir. 1975), whereas there is a split of authority on the precise requirements of the Convention. *Compare Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994) with *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999).

Respondents contend (Br. 18-21) that it would be improper to find an arbitration provision enforceable under the FAA where it did not meet the writing requirements of the Convention. But this argument wrongly assumes that the two statues cannot peacefully coexist. To be sure, where an arbitration agreement falls under the Convention—*e.g.*, where all of the requirements of the Convention relating to the nature and form of the agreement and the place of arbitration are satisfied—then the Convention governs, and "Chapter 1 [of the FAA] applies . . . to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208.

But if the Convention does not apply—where, for instance, the place of arbitration is not in a jurisdiction that is a signatory to the Convention, or where the agreement does not meet the writing requirements of the Convention—nothing in the United States' ratification of the Convention suggests that it was the intent of Congress that the FAA should not still apply in its own right, independently from the Convention, as the Federal law of the land. Of course, in such case a court could not utilize the Convention's power, absent in Chapter 1 of the FAA, to compel arbitration outside its district (though it could stay the litigation pending

arbitration pursuant to 9 U.S.C. § 3). Moreover, the successful party could not rely on the Convention's longer timebar provisions, provided in 9 U.S.C. § 207, for seeking recognition and enforcement of the arbitration award, nor could it rely on the Convention's restrictive limitations on when an award may be vacated.

There is nothing, however, in the language of the FAA or the Convention, or in the Federal policy interests upon which the United States' ratification of the Convention is based, to suggest the Convention was intended to preempt the FAA in this respect. Indeed, such a finding would be fundamentally backwards. The FAA and the Convention were both designed to *encourage* arbitration and to foster the enforcement of arbitration awards, and there is no support for the suggestion that the United States intended to *narrow* the grounds available for enforcement of arbitration agreements under the FAA by its ratification of the Convention. Rather, the opposite clearly was the case.

Respondents' interpretation of Article VII of the Convention as applying only to arbitration awards and not agreements to arbitrate is flawed. In the first place, the present case falls even within Respondents' restrictive reading of this section because Petitioner Neilson is seeking to "avail himself of an arbitral award" within the meaning of Article VII by seeking to compel arbitration of Respondents' claims. In any event, the intent of Article VII is to make clear that nothing in the Convention should be construed as limiting a party's ability to seek relief under another treaty or domestic statute where that other treaty or statute is more favorable towards arbitration than the Convention. That

is precisely the case here, where the writing requirements of the FAA are arguably more lenient than those of the Convention.

This interpretation is made explicit by UNCITRAL in its July 7, 2006 recommendation, (*see* Petitioner's Main Brief, 25-a), which explicitly recommends:

> That article VII, paragraph 1 of the Convention . . . should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The UNCITRAL recommendation thus speaks *directly* to the present situation, where the arbitration provision in Neilson's Employment Agreement indisputably would be enforceable under the FAA even if it were not enforceable under the Convention. And UNCITRAL is clear that Petitioner should be permitted to rely on that more favorable domestic legislation in seeking enforcement of its agreement to arbitrate if the Court concludes that the Convention does not apply.

D. *There Is A Split Of Authority On The Proper Interpretation Of Article II(2)'s Writing Requirement*

It is a matter of record that the Second and Fifth Circuit Courts Of Appeals have interpreted Article II(2) of the Convention quite differently. *Compare Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666

(5th Cir. 1994) with *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999). And it can hardly be disputed that if the Fifth Circuit's interpretation were followed by this Court, the question of whether Neilson's Employment Agreement was "signed by the parties or contained in an exchange of letters or telegrams" would never arise, because under the Fifth Circuit's interpretation that requirement only applies to stand-alone arbitration agreements, and not to arbitration provisions contained in contracts. *Sphere Drake* at 669. Petitioners have acknowledged that the decision in *Sphere Drake* has been criticized; however, that decision is in fact more consistent with UNCITRAL's recommendation in favor of an inclusive reading of Article II(2), (*see* Main Brief, 29-a), and also clear Federal policy, as embodied in 9 U.S.C. § 2, that a written arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Respondents raise technical objections to Petitioners' raising of this split of authority to this Court, but of course the proper interpretation of the writing requirement of Article II(2) of the Convention clearly *was* a central issue raised before the lower courts—and, indeed, the decisions below turned directly on this issue—so Respondents' suggestion that the petition fails to raise an important issue of Federal law addressed by the courts below is simply wrong.

E. *The Missouri Court Of Appeals Erred In Failing To Refer Issues Of Arbitrability To The Arbitrators Pursuant To The Clear And Unmistakable Provisions Of The Employment Agreement And The Asset Purchase Agreement*

Respondents rely (Br. 28-29) solely on Missouri state law to contend that the Missouri Court of Appeals acted properly in deciding the question of arbitrability in this case. But the United States Supreme Court has made clear that in analyzing the question of arbitrability, the courts must first consider whether the parties agreed to submit questions of arbitrability to the arbitrators. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Where the evidence is "clear and unmistakable" that they agreed to do so, that agreement must be honored and the case referred to the arbitrators for a determination of arbitrability. *Id.*

Respondents dismiss *First Options* in a footnote (Br. 21, n. 8), noting that "the Missouri Court did not cite or refute *First Options* in any way." Of course, this statement merely underlines the fundamental failure of the Missouri Court of Appeals' reasoning and decision. Had that court properly considered this Court's directive in *First Options*, it would have concluded that the issues of whether the claims against Neilson, Atlas and GIL are subject to arbitration must themselves be submitted to arbitration, and it would not have undertaken its improper "threshold" analysis of the claims and the agreements.

As to the Atlas/GIL asset purchase agreement, Respondents gloss right over the unequivocal contract language and set right to attacking the decisions in *Contec Corp. v. Remote Solution Co. Ltd.*, 398 F.3d 205 (2d Cir. 2005), *Terminix Int'l Co., LP v. Palmer Ranch LP*, 432 F.3d 1327 (11th Cir. 2005), and the many decisions following them, which hold that where the parties have incorporated arbitration rules such as the AAA Rules here at issue which "clearly and unmistakably" refer issues of arbitrability to the arbitrators, those rules must be enforced under *First Options*. Of course, the language of the Asset Purchase Agreement is itself crystal clear on this point without need to even refer to the AAA rules. It provides: "The parties agree this is a broad form arbitration agreement, designed to encompass all possible Disputes, *including Disputes over arbitrability or jurisdiction.*" (Emphasis added). It would be frivolous for Respondents to dispute the clear and unmistakable intent of this clause to refer all issues of arbitrability to the arbitrators, and indeed Respondents do not even purport to do so in their Response.

Insofar as Neilson's Employment Agreement is concerned, Respondents' criticism of *Contec, Terminix* and the other similarly holding decisions is baseless. It is trite law that arbitration rules incorporated into a contract are fully enforceable, and every Federal court of appeals which has considered the issue has agreed with the *Contec* court that incorporation by reference to arbitration rules which themselves clearly and unmistakably refer issues of arbitrability to the arbitrators must be enforced under *First Options*. Indeed, the FAA has been held to prohibit courts from

imposing stricter rules for the enforcement of arbitration provisions in a contract than would apply to the other contract terms. *See, e.g., Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [9 U.S.C. § 2]."). As such, there is no basis to subject the arbitrability provision of the AAA Rules to any stricter scrutiny than would apply to the rest of the agreement.

Respondents attempt to defend the correctness of the Missouri Court of Appeals' conclusion that the claims were not subject to arbitration, but this is not the question. The question is whether the courts below acted properly in considering this issue in the first place. The law could not be clearer that they should not have done so. The issue of arbitrability was "clearly and unmistakably" referred to the arbitrators, both in the Employment Agreement by incorporation of AAA rules which so provide, and in the Asset Purchase Agreement by explicit contract language and also in governing AAA rules. As such, the question of arbitrability should have been referred to the arbitrators in each instance and should not have been decided by the courts below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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